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Cheryl L. Rushton v. Gelco Express and Employers Mutual Liability of Wausau : Brief of Respondent

Utah Supreme Court

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86 80095 IN THE SUPREME COURT OF THE STATE OF UTAH

CHERYL L. RUSHTON, Applicant/Appellant vs. GELCO EXPRESS and EMPLOYERS MUTUAL LIABILITY OF WAUSAU, Defendants/Respondents:	Supreme Court No. 8600095 Industrial Comm. No.: 85 000816 Category 6

Appeal From An Order Of The Utah State Industrial Commission

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

The sole issue on appeal is whether there is sufficient competent evidence in the record to sustain the findings of the Administrative Law Judge, which findings were affirmed by the Commission on February 3, 1986.

NATURE OF THE CASE

On December 27, 1983, while in the course and scope of her employment, appellant slipped and fell in the parking lot of her employer. She subsequently filed an Application for Hearing before the Industrial Commission claiming both temporary total and permanent partial disability benefits. Following a medical panel evaluation of the appellant, the Administrative Law Judge ordered the respondents to pay all of the appellant's reasonable medical expenses incurred as a result of the accident plus temporary total disability benefits from December 27, 1983 through August 31, 1984. He denied the

appellant's claim for permanent partial disability benefits. The Commission affirmed the Order of the Administrative Law Judge on February 3, 1986 and this appeal followed.

STATEMENT OF THE FACTS

1. On December 27, 1983, the appellant slipped on ice and snow in the parking lot of her employer and fell to her hands and knees. (R. at 2).

2. After this fall, appellant began experiencing pain in her upper back, neck and arms. (R. at 2).

3. Appellant reported the accident to her employer and was paid temporary total disability benefits from December 28, 1983 to August 26, 1984. In addition, medical payments were made on her behalf in the amount of $3,141.23. (R. at 2, 74).

4. On September 13, 1984, appellant filed an Application for Hearing with the Industrial Commission. In the Application, appellant claimed additional temporary total plus permanent partial disability benefits for an injury to her back. (R. at 25).

5. Prior to the date appellant filed her application, three different doctors had indicated that her condition was medically stable and she could return to work. (R. at 7, 15, 19).

6. In October 1984, approximately ten months after her fall, appellant began to complain of pain in her knees to Dr. Gordon R. Kimball. (R. at 35).

7. X-rays of appellant's knees revealed a lateral riding patella which Dr. Kimball diagnosed as "bilateral traumatic chondromalacia of the patella secondary to the accident." (R. at 35).

8. Dr. Kimball further stated, however, that although he suspected the accident caused the appellant's knee problems, argument on this issue was highly likely. (R. at 35).

9. Objective tests performed on the appellant included a CT scan of her cervical spine, an EMG, x-rays of her neck and a bone scan. The results of all of these tests were normal with the exception of a "slight reversal of the normal cervical ordodic curve in the mid portion of the cervical spine." (R. at 7, 34, 35).

10. Appellant was eventually referred for evaluation to a medical panel appointed by the Commission. The medical panel found appellant was temporarily totally disabled as a result of the industrial accident through August 1984. It also determined that appellant had suffered no permanent partial disability as a result of the industrial accident. (R. at 41, 42).

11. On December 31, 1985, the Administrative Law Judge issued a Supplemental Order in response to the appellant's Motion for Review. Therein he adopted the findings of the medical panel with regard to the issues of appellant's temporary total disability and permanent partial disability. (R. at 76).

SUMMARY OF THE ARGUMENT

The findings of the Industrial Commission cannot be overturned on appeal in the absence of a showing that its findings are arbitrary and capricious. Findings are not arbitrary and capricious where they are supported by substantial competent evidence. In the instant case, the evidence in the record is clearly sufficient to support the findings of the Commission, therefore, its order must be affirmed.

ARGUMENT

I. THE FINDINGS OF THE INDUSTRIAL COMMISSION CANNOT BE OVERTURNED ON APPEAL SO LONG AS THEY ARE SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

Utah Code Annotated, §35-1-84 (1953 as amended) provides that upon review of an order of the Industrial Commission, the Supreme Court may affirm or set aside the award. However, an award may only be set aside upon the following grounds:

(1) That the Commission acted without or in excess of its powers;

(2) That the findings of fact do not support the award.

The standard of review identified in §35-1-84 is a limited one as is evidenced by the decision in Blaine v. Industrial Commission of Utah, 700 P.2d 1084 (Utah 1985). Therein the Court stated:

> This Court has interpreted the foregoing statutory standard [§35-1-84] on numerous occasions and has concluded that the Commission's findings are not to be displaced in the absence of a showing

> that they are arbitrary and capricious. (Footnote omitted).

Id. at 1086. Findings of the Commission are deemed to be arbitrary and capricious only where there is no substantial competent evidence to support them. This fact is illustrated by the decision in Vause v. Industrial Commission, 17 Utah 2d 217, 407 P.2d 1006, 1008 (1965) where the following comment was made:

> This Court cannot properly reverse the Commission and compel an award unless there is credible evidence without substantial contradiction which points so clearly and persuasively in plaintiff's favor that failure to so find would justify the conclusion that the Commission acted capriciously, arbitrarily or unreasonably in disregarding or refusing to believe the evidence.

See also Garner v. Hecla Mining Co., 19 Utah 2d 367, 431 P.2d 794, 796 (1967). In the instant case, there is no question but that there is substantial competent evidence in the record to support the findings and order of the Administrative Law Judge. Thus, the decision of the Commission must not be disturbed.

A. The Administrative Law Judge's Award Of Temporary Total Disability Benefits From December 27, 1983 Through August 31, 1984 Was Not Arbitrary and Capricious As There Was Conflicting Medical Evidence On The Issue Of Temporary Total Disability.

The Administrative Law Judge awarded temporary total disability benefits to the appellant from December 27, 1983 through August 31, 1984. Appellant claims she is entitled to additional benefits through November 30, 1984, based upon the report of her treating physician Dr. Gordon R. Kimball. In addition to the report of Dr. Kimball, however, the

Administrative Law Judge had before him the conflicting reports of several other qualified physicians. For example, Dr. Dennis D. Thoen, a neurologist who examined the appellant for purposes of an independent medical examination, diagnosed appellant's injury as a "mild cervical strain" which, as of the date of his examination on July 17, 1984, had resolved. (R. at 19). He indicated that he believed appellant could return to light duty work (work not requiring any lifting over 30 pounds) at that time and that she could work without restriction if she would be willing to involve herself in a rigorous physical fitness program for three to four weeks.

Dr. Thoen was not the only doctor who felt the appellant's condition was stable enough for her to return to work prior to November 30, 1984. Dr. Gerard Vanderhooft, made the following statement in a letter to Dr. Wayne Zundel dated January 19, 1984, just three weeks after the appellant's fall:

> This is one of those difficult cases where the objective of [sic] findings do not corroborate the patient's subjective symptoms. In a nice way I explained this to her and suggested to her that she return to work as soon as possible. . . . I certainly do not believe that any harm would occur if she did return to work, but how much pain a person has following a soft tissue injury is very difficult to predict. . . . Suffice it to say that I would think it would be in everyone's best interest for her to return to work as soon as possible . . ..

(R. at 7). And finally, Dr. Walter Reichert, another treating physician, indicated that he was going to release the appellant to return to work in mid-April 1984:

> I will release the patient to return to work on April 16. . . . She will continue with the aggressive physical therapy in the next week prior to her back-to-work date at which time I have released her for full duty.

(R. at 15). As can be seen from the evidence presented above, there were clear conflicts in the record regarding the period of appellant's temporary total disability. Therefore, the Administrative Law Judge submitted the matter to a medical panel for an impartial evaluation. In its report dated May 11, 1985, the medical panel found appellant's period of temporary total disability to extend from the date of her injury through August 1984. The Administrative Law Judge subsequently adopted the panel's finding as his own and ordered temporary total disability benefits to be paid to the appellant through August 31, 1984. Because there is competent evidence supporting the award which was made, the Commission's order must be affirmed.

B. The Commission Is The Trier of Fact And It Is Not Bound To Defer To The Testimony Of The Appellant's Treating Physician Where There Is Other Conflicting Medical Testimony In The Record.

In Point III of her brief, appellant contends that where the medical panel report and the treating physician's report are conflicting, as in the instant case, the Administrative Law Judge should be required as a matter of law to defer to the report of the appellant's treating physician. This argument, however, flies in the face of the well-established rule that the Commission is the recognized trier of fact in workmen's compensation proceedings.

See Mollerup Van Lines v. Adams, 16 Utah 2d 235, 398 P.2d 882, 885 (1965); Clinger v. Industrial Commission of Utah, 571 P.2d 1328, 1329 (Utah 1977). This fact finding role of the Commission was acknowledged and the proposition appellant espouses specifically rejected in Mellen v. Industrial Commission, 19 Utah 2d 373, 431 P.2d 798 (1967). In Mellen the applicant sought workmen's compensation benefits after suffering a heart attack. The applicant's treating physician testified that the applicant's heart attack may have been brought on by exertion on the job. The medical panel, on the other hand, found it to be the natural result of a degenerative condition. The Administrative Law Judge adopted the findings of the panel and the applicant appealed. The Utah Supreme Court affirmed the decision of the Commission stating:

> The Commission is the fact-finder in cases like this and in its conclusion in such a case, we cannot say that it must reject the panel's canvass of the facts in favor of the qualified opinion of plaintiff's personal physician. (Emphasis added).

Id. at 799.

As support for her position that the report of a treating physician is entitled to greater deference than any other medical evidence, appellant cites several social security cases. However, a review of those decisions only confirms the contention of the respondents that where there is conflicting evidence in the record, the Commission is the entity responsible for resolving those conflicts and where its findings are supported by competent evidence, they should not be disturbed.

In fulfilling its role as the fact-finder, the Commission must not only not defer to the evidence of any particular party, but it must weigh all of the evidence presented before reaching a final decision. The responsibility of the Commission in this regard was discussed in Moyes on Behalf of Moyes v. State, 699 P.2d 748 (Utah 1985). Therein, the petitioner filed a Writ of Review to set aside an order of the Industrial Commission. She alleged in part that the Commission had acted arbitrarily and capriciously by adopting portions of the medical panel's report in its findings of fact. The Court first noted that it is not unusual for the Commission to adopt the report of the medical panel in its findings and then it stated:

> We have noted, however, that in 'discharging [the Commission's] responsibility it [is] the prerogative and duty of the Commission to consider not only the report of the medical panel, but also all of the other evidence and to draw whatever inferences and deductions [that] fairly and reasonably could be derived therefrom.' IGA Food Fair v. Martin, 584 P.2d at 830. Consideration of the other evidence does not require that the Administrative Law Judge or the Commission ignore or rewrite the medical panel report if they agree with it and deem it an adequate summary of their own findings. All that is required is some indication that the Administrative Law considered the other evidence and that his findings are fair and reasonable in light of all the evidence. (Emphasis added).

Id. at 753. It is apparent in the instant case that the Administrative Law Judge considered all of the evidence in the record before adopting the report of the medical panel in his findings of fact. It is also apparent that the conclusions he reached are fair and reasonable in light of all the evidence.

Various portions of the testimony of each of the physicians who attended the appellant are cited in both the original Findings of Fact, Conclusions of Law and Order and in the Supplemental Order. Furthermore, the Administrative Law Judge made the following specific finding with regard to the appellant's claim for permanent partial disability benefits:

> The Administrative Law Judge adopts the findings of the medical panel report dated May 11, 1985 that the Applicant did not sustain a permanent partial impairment as a direct result of the industrial injury. See medical panel report dated May 11, 1985, page 2, item 5. Based upon the medical records in the Industrial Commission file from Dr. Gerard F. Vanderhooft; Dr. Dennis Thoen; and Dr. Walter H. Reichert, the findings of the medical panel is [sic] accurate and correct.

(R. at 74). (See also R. at 62). The reports of Dr. Vanderhooft, Thoen and Reichert indicate no permanent partial disability of any kind suffered by the appellant. Although Dr. Kimball gave appellant an impairment rating of 9%, he expressed some definite reservations about his findings. For example, in discussing appellant's impairment due to her cervical sprain he stated: "If she has any permanent partial disability rating it would be no more than 5% for the chronic cervical sprain . . .." (Emphasis added). (R. at 36). In a later report dated October 3, 1985, Dr. Kimball reaffirmed this 5% impairment rating but he noted that the rating was based more on subjective symptoms than on objective findings and that it was given "in spite of the fact that there [was] no evidence of disc or bony injury." (R. at 56). His finding that the appellant's knee problems were caused by the

industrial accident was also tentative as evidenced by his ready acknowledgement that this conclusion was subject to argument. And finally, Dr. Kimball stated with regard to the appellant's overall rating: "This might give her a total overall disability rating of 9% of the whole man as a result of the industrial accident." (R. at 36).

The only other report giving the appellant a ratable impairment was the medical panel report. However, it found her total impairment to be only 2% of the whole man. Furthermore, it found the entire 2% impairment to be the result of pre-existing congenital problems affecting her knees. The appellant was not found to have suffered any impairment as a result of cervical sprain. The medical panel's finding in this regard does not appear to be unreasonable in view of the qualified findings of the appellant's own treating physician and in view of the fact that no other treating physician felt appellant had suffered any impairment at all. Furthermore, where the appellant did not complain of knee pain until approximately ten months after the industrial accident occurred, and where Dr. Kimball admitted that his conclusion that appellant's knee problems were caused by the accident was arguable, it was not arbitrary for the Commission to adopt the medical panel's finding of no impairment attributable to the industrial accident.

C. Appellant Is Not Entitled To Benefits From The Second Injury Fund For The Pre-existing Condition Of Her Knees Because Her Impairment Was Not Greater After The Industrial Accident

As previously noted, the medical panel assigned to evaluate the appellant's condition found her to have a 2% whole body impairment as a result of "congenital or developmental symmetrical spurring of articular surfaces of the patellas." (R. at 42). The panel also found that the entire 2% was attributable to pre-existing conditions. These findings were adopted by the Administrative Law Judge and appellant now contends she is entitled to benefits from the Second Injury Fund for this pre-existing impairment. Second Injury Fund participation is governed by U.C.A., §35-1-69. That section reads in part as follows:

> If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which either compensation or medical care, or both, is provided by this chapter that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, compensation, medical care and other related items as outlined in Section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of employer for such compensation, medical care, and other related items shall be for the industrial injury only. (Emphasis added).

It is apparent after reading §35-1-69 that the Second Injury Fund is only liable for benefits where the industrial injury results in a permanent incapacity after the accident which is substantially greater than the incapacity the

applicant would have had if he/she had not had the pre-existing condition. See Kaiser Steel Corp. v. Industrial Commission of Utah, 709 P.2d 1168, 1170 (Utah 1985) ("Second Injury Fund Liability is imposed, not when the second injury itself causes a 'substantially greater' incapacity, but when the worker's total incapacity following the second injury is 'substantially greater' than it would have been but for the pre-existing incapacity."). In the instant case, the Administrative Law Judge determined that the industrial accident of December 27, 1983, did not cause the appellant to suffer any additional impairment. Thus, her impairment after the accident was the same as it was before the accident. Under these circumstances, appellant does not meet the threshold requirement for triggering Second Injury Fund participation.

Appellant further contends there is no evidence in the record to support the Administrative Law Judge's finding that the condition of claimant's knees was only temporarily aggravated by the industrial accident. However, a review of Dr. Chester Powell's consultation report proves otherwise. For example, after reviewing the x-rays of appellant's knees, Dr. Powell noted that the changes seen were minimal, were old and were suggestive of a developmental abnormality. (R. at 46, 47). He also stated that there were no current clinical findings affecting appellant's knees at the time of his examination and that she was not in continual discomfort as a result of her knee problems. He then concluded:

> It is reasonable in retrospect to consider that Mrs. Rushton sustained some degree of a cervical strain and perhaps a contusion of her knees but the circumstances of the accident and the described character of the x-ray changes of the knees suggests these are more probably developmental changes and not attributable to that specific accident. (Emphasis added).

(R. at 47). Furthermore, although appellant alleges the medical panel made a definite finding that the industrial accident aggravated her knee condition, in reality it found as follows:

> It is possible the circumstances of the accident activated a symptomatic phase of the changes seen in the knees. (Emphasis added).

(R. at 42). It is apparent, after reviewing the complete finding, that it was not definitely concluded by the panel that appellant's knees were, in fact, aggravated by her fall. The evidence that Dr. Powell, chairman of the medical panel, found only that appellant may have suffered a possible bruising of her knees due to her fall together with the evidence that appellant failed to report any problems with her knees for ten months following the accident, lends support to the Administrative Law Judge's finding that any aggravation possibly suffered by the appellant was only temporary. Even if the Administrative Law Judge acted improperly in finding appellant's condition to have been temporarily aggravated by the industrial accident, however, the outcome remains the same for appellant was not found to have a "substantially greater" total incapacity following the accident. Rather her incapacity before and after remained the same. Thus Second Injury Fund

participation is not warranted and the Order of the Administrative Law Judge to this effect should be affirmed.

II. RULE 1.1.10 OF THE WORKER'S COMPENSATION RULES AND REGULATIONS PROCEDURE EFFECTIVE AUGUST 17, 1984, IS DETERMINATIVE OF THE ATTORNEY'S FEES TO WHICH COUNSEL FOR THE APPELLANT IS ENTITLED

U.C.A., §35-1-87 grants to the Commission the authority to regulate and fix the fees of attorneys representing applicants in Industrial Commission cases. Rule 1.1.10 of the Worker's Compensation Rules and Regulations - Procedure Effective August 17, 1984 was adopted pursuant to the authority granted in §35-1-87. Rule 1.1.10 indicates that an applicant's counsel is entitled receive fees in accordance with the schedule set forth therein although some discretion may be used by the Administrative Law Judge if the fees under the schedule would be unconscionable to either the applicant or his counsel. The provision of the schedule applicable in the instant case provides that an applicant's counsel is entitled to receive "20% of weekly compensation generated for the first $15,000. . . ." In the instant case the only compensation generated by appellant's attorney over and above the compensation that had already been paid to the applicant prior to the filing of her Application for Hearing was temporary total disability benefits from August 27, 1984 to August 31, 1984. Therefore appellant's attorney is entitled to 20% of the total of four days of temporary total disability benefits unless the Administrative Law Judge in his discretion determines other fees are appropriate.

CONCLUSION

Findings of the Industrial Commission cannot be overturned in the absence of a showing that they are arbitrary and capricious. Where the findings of the Industrial Commission are supported by substantial competent evidence they are not arbitrary and capricious. As the trier of fact the Commission is entitled to weigh all of the evidence before it and to assess the credibility of the evidence and the witnesses in making its findings. The Commission followed this procedure in the instant case and there is ample evidence in the record to sustain its findings, therefore, its order of December 31, 1984 should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of August, 1986.

RICHARDS, BRANDT, MILLER
AND NELSON

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Respondents

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this 6th day of August, 1986, to the following counsel of record:

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